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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,	)	No. CR 07-0335 SI
	)	
Plaintiff,	)	UNITED STATES' SENTENCING
	)	MEMORANDUM
v.	)	
	)	Date: January 24, 2008
MARTIN SIMON,	)	Time: 3:30 p.m.
	)	
Defendant.	)	

On September 14, 2007, defendant pleaded guilty to a single count of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. § 922(g) pursuant to Rules 11(c)(1)(A) and 1(c)(1)(B) of the Federal Rules of Criminal Procedure. The United States endorses the sentencing recommendation of the probation office and respectfully asks this Court to sentence defendant to 77 months imprisonment (with credit for time served in state custody pursuant to San Mateo County case number SC63441A),<sup>1</sup> three years of supervised release, and a

<sup>1</sup>Defendant was arrested on San Mateo County case number SC63441A on March 17, 2007. On January 24, 2008, the date that he will be sentenced in this case, he will have been in custody on the state case for 10 months and 7 days. Should this Court choose to give defendant credit for the time served on the state charge (as contemplated by the plea agreement), this court should impose a sentence of 66 months and 24 days, which represents the 77 month guideline

1 \$100 special assessment. This sentence constitutes the low end of the advisory guideline range  
2 and comports with the factors listed in 18 U.S.C. § 3553(a).

3  
4 BACKGROUND

5 On March 17, 2007, two officers assigned to the San Mateo County Gang Task Force  
6 were patrolling East Palo Alto in an unmarked police vehicle. As they drove west on Azalia  
7 Drive, they saw a red Pontiac Grand Am pass them traveling in the opposite direction. The  
8 driver of the police vehicle, Burlingame Police Inspector Jay Kiely, recognized the man in the  
9 Pontiac's front passenger seat as Martin Simon. Inspector Kiely knew of defendant from  
10 defendant's lengthy violent history within the city of East Palo Alto. Inspector Kiely also knew  
11 that defendant was on parole, and he decided to conduct a parole stop. The officers made a U-  
12 turn to do so.

13 The officers saw the Pontiac pull halfway into the driveway of a house on Azalia Drive.  
14 When they arrived, defendant had left the Pontiac and was walking up the driveway. Inspector  
15 Kiely, who was wearing his uniform, got out of his vehicle and shouted, "Martin, stop!"  
16 Defendant, who was about fifteen feet away from Inspector Kiely, turned and looked at the  
17 officer. Inspector Kiely saw defendant's hands in the area of his front waistband, under his t-  
18 shirt. Defendant then ran across the driveway and began climbing over a fence. Inspector Kiely  
19 followed defendant, reached the fence, and grabbed him. He saw defendant holding a pistol in  
20 his right hand. Inspector Kiely pulled defendant off of the fence and onto the ground, which  
21 caused defendant to drop the gun. Defendant and Inspector Kiely had a physical altercation,  
22 during which defendant grabbed and squeezed Inspector Kiely's genitals. Inspector Kiely and his  
23 patrol partner were able to subdue and handcuff defendant. They recovered the gun from the  
24 ground. It was a loaded, semi-automatic .38 caliber Walther pistol, which subsequent analysis  
25 showed to have been manufactured outside of the State of California. The officers also  
26 recovered from the ground a bag containing about 30 ounces of marijuana. When they searched  
27

28 sentence, less the 10 months and 7 days defendant has been in custody on the state case.

1 defendant incident to arrest, the officers found a four-gram bundle of marijuana, a digital scale,  
2 and \$134 in cash.

3 After being advised of his *Miranda* rights, defendant stated that he was carrying the gun  
4 because people were trying to kill him.

5 Defendant was charged in state court with possession of a firearm by a felon and with  
6 resisting a public officer. He pleaded guilty to both charges on April 13, 2007 and was sentenced  
7 in two years in state prison. (Tab 1: *Abstract of Judgment*, Case SC063441A.) The United States  
8 Attorney's Office sought, and was granted by the Assistant Attorney General, permission to  
9 prosecute defendant pursuant to the Department of Justice's dual prosecution policy. On May  
10 29, 2007, a federal grand jury in the Northern District of California returned an indictment  
11 charging the defendant with one count of violating 18 U.S.C. § 922(g). Defendant pleaded guilty  
12 to this charge on September 14, 2007.

### 13 ARGUMENT

14 The United States supports the sentencing recommendation of the probation office that  
15 defendant be sentenced to 77 months (with credit for time served on the state charge), which  
16 recommendation is consistent with the Sentencing Guidelines and the sentencing factors laid out  
17 in 18 U.S.C. § 3553(a).

#### 18 A. The Applicable Sentencing Range Under the Guidelines is 77-96 Months

19 Under the Sentencing Guidelines, defendant's base offense level is 24,  
20 U.S.S.G. § 2K2.1(a)(2), because defendant committed the instant offense subsequent to  
21 sustaining two felony convictions for controlled substance offenses. Specifically, on December  
22 3, 2001, defendant was convicted of the possession of rock cocaine for sale in San Mateo County  
23 (Tab 2: *Abstract of Judgment*, Case SC049317A; PSR ¶ 38), and on June 20, 2003, defendant  
24 was again convicted of the possession of rock cocaine for sale in San Mateo County (Tab 3:  
25 *Abstract of Judgment*, Case SC053421A; PSR ¶ 41).

26 The government agrees that defendant qualifies for the three-point credit pursuant to  
27 U.S.S.G. § 3E1.1 for acceptance of responsibility. His adjusted offense level, therefore, is 21.

28 As calculated by the Probation Office, defendant receives 13 criminal history points,

1 which places him in Criminal History Category VI. The United States agrees with this  
2 calculation.

3 B. The Plea Agreement Provides That Defendant Should Receive Credit for All Time  
4 Served in Custody Pursuant to the State Prosecution for the Offense Conduct

5 Both the United States and the State of California have prosecuted defendant for having  
6 possessed a loaded gun on March 17, 2007, after having being convicted of a felony. These  
7 separate prosecutions, undertaken independently by separate sovereigns, are entirely permissible.  
8 *Heath v. Alabama*, 474 U.S. 82, 88 (1985); *United States v. Traylor*, 978 F.2d 1131, 1132 (9th  
9 Cir. 1992). The United States recognizes, however, that a subsequent prosecution does impose  
10 additional burdens on a defendant. The terms of the plea agreement recognize these concerns.  
11 The plea agreement expressly provides that defendant should receive an adjustment to his  
12 sentence under U.S.S.G. § 5G1.3(b) for the time that defendant has served in state custody with  
13 respect to San Mateo County case number SC63441A. The plea agreement provides that this  
14 Court should calculate the exact amount of time that has been so served at the time of sentencing.  
15 (Plea Agreement p.3 n.2.)

16 Since defendant was first detained on the state case on March 17, 2007, his sentence  
17 should be adjusted by 10 months and 7 days, which is the amount of time between March 17,  
18 2007 and the sentencing date in this case, January 24, 2008. U.S.S.G. § 5G1.3(b). In addition,  
19 the plea agreement provides that defendant's federal sentence should run concurrently with the  
20 undischarged term of imprisonment in his state case. U.S.S.G. § 5G1.3(c). The United States,  
21 therefore, respectfully asks the Court to

- 22 • sentence defendant to 66 months and 24 days,
- 23 • state that this sentence does not represent a departure from the guidelines but is
- 24 instead imposed under the provisions of U.S.S.G. § 5G1.3(b) for the time spent on the
- 25 undischarged time of imprisonment in San Mateo County case number SC63441A to
- 26 account for time in custody that would not otherwise be credited by the Bureau of
- 27 Prisons,
- 28 • and order that the federal sentence run concurrently with the state sentence.

1 With these adjustments to his sentence, defendant has suffered no prejudice from the dual  
2 prosecution in this case—beyond that fact that he is being punished under federal law for having  
3 committed a federal crime. Defendant will not serve any more time in prison because of the state  
4 conviction than he otherwise would have had he been prosecuted solely in federal court.  
5 Defendant's state court conviction did not add any points to his criminal history score. (PSR ¶  
6 44). Further, the United States did not use the fact that he had pleaded guilty in state court to this  
7 conduct at any phase of these prosecutions, other than to secure permission to bring a subsequent  
8 prosecution and to credit the state sentence in the plea agreement. Any further departure granted  
9 by this Court for the fact of a dual prosecution in this case would represent an unwarranted  
10 windfall for the defendant.

11 C. A Sentence of 77 Months is Substantively Reasonable in this Case.

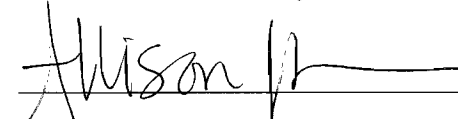
12 18 U.S.C. § 3553(a) counsels that a sentencing court must consider “the nature and  
13 circumstances of the offense and the history and characteristics of the defendant” when crafting a  
14 reasonable sentence. Further, 18 U.S.C. § 3553(a)(2)(C) directs the court to consider the need  
15 for the sentence imposed “to protect the public from further crimes of the defendant.” There is  
16 abundant evidence in defendant's criminal history and offense conduct that he poses a persistent  
17 danger to the community in which he lives. Defendant has twice been convicted of possessing  
18 rock cocaine for sale. He has twice been shot, and, in this case, stated he was carrying the loaded  
19 gun for protection. One can safely infer that, if threatened, defendant was fully prepared to use  
20 the weapon. In this case, defendant injured the police officer who was trying to arrest him. In  
21 his arrest in December 2002, defendant tried to kick the arresting officer in the head. (PSR ¶ 41).  
22 Records in that case indicate that defendant had run from the police officer no fewer than 20  
23 times in the past. (PSR ¶ 41.) Defendant has had his probation or parole revoked on multiple  
24 occasions, including in December, 2002 (PSR ¶ 38); in August, 2005 (PSR ¶ 41), and in  
25 September, 2007 (PSR ¶ 43). Defendant committed the instant offense while under a criminal  
26 justice sentence and fewer than two years following his release from imprisonment. (PSR ¶ 46).  
27 Defendant has admitted to using gang signs (PSR ¶ 48) and, as his arrest in this case indicates, is  
28 well known to members of the San Mateo County Gang Task Force.

1 Given this lengthy criminal history, the inherent dangerousness of carrying a concealed,  
2 loaded gun "for protection," and Defendant's history of defiance of the law, a 77-month sentence  
3 is reasonable in this case. The United States asks that the Court impose this sentence (less the  
4 period of time that defendant has spent in custody since his arrest on the charge in San  
5 Mateo County Case No. SC63441A), which results in an adjusted sentence of 66 months and 24  
6 days, followed by a 3-year term of supervised release, and a \$100 special assessment.

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8 DATED: January 17, 2008

Respectfully submitted,

9 JOSEPH P. RUSSONIELLO  
10 United States Attorney

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12 ALLISON MARSTON DANNER  
13 Assistant United States Attorney  
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